123 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Empire District Electric Company

Docket Nos. ER99-1757-011
ER99-1757-013
EL05-67-000
EL05-67-001

ORDER DENYING REQUEST FOR STAY

(Issued May 27, 2008)

1. On May 5, 2008, Empire District Electric Company (Empire) filed a request for stay, or, in the alternative, a request to establish a refund escrow account pending judicial review of a Commission order issued on April 25, 2008.[1] In that order, the Commission required that Empire make refunds for wholesale transactions in which Empire's market power was not properly mitigated. As discussed below, we deny Empire's requests for stay and for establishment of an escrow account.

I. Background

2. On August 15, 2006, the Commission issued an order[2] accepting a proposed mitigation proposal filed by Empire District for sales made in the Empire balancing authority area subject to certain modifications and subject to the outcome of Order No. 697.[3] The Commission found that Empire's proposed tariff language would improperly limit mitigation to certain customers in the Empire balancing authority area,

[1] *Empire District Electric Co.*, 123 FERC ¶ 61,084 (2008) (April 25 Order).

[2] *Empire District Electric Co.*, 116 FERC ¶ 61,150, at P 12 (2006) (August 15 Order).

[3] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008).

namely, only to sales to those buyers that serve end-use customers in the Empire balancing authority area. The Commission established a refund effective date of May 16, 2005.[4]

3. In the April 25 Order, the Commission denied a request for rehearing of the August 15 Order, affirming its earlier finding that Empire's proposed tariff language would not properly mitigate Empire's potential to exercise market power in the Empire balancing authority area. The Commission noted that, since the issuance of the August 15 Order, the Commission had issued Order No. 697, in which it found that adequately protecting customers from the potential exercise of market power required that it continue to apply mitigation to all sales in the balancing authority area in which a seller is found, or presumed to have, market power. The Commission denied Empire's request that the Commission waive refunds, finding that ordering refunds was consistent with Commission policy that "applicants that have a presumption of market power … will have their rates prospectively made subject to refund."[5]

II. Request for Stay

4. On May 5, 2008, Empire filed a request for stay, or, in the alternative, a request to place refunds into an escrow account pending judicial review of the April 25 Order. Empire argues that the Commission may stay its action when "justice so requires." 5 U.S.C. § 705 (2000). In deciding whether justice requires a stay, the Commission generally requires several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.[6] Empire concedes that the Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.[7]

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[4] The procedural history is discussed at greater length in the April 25 Order at P 2-11.

[5] April 25 Order, 123 FERC ¶ 61,084 at P 23 (citing *AEP Power Marketing, Inc*., 107 FERC ¶ 61,018, at P 149) (2004).

[6] Empire Motion at 4 (citing *CMS Midland, Inc*., 56 FERC ¶ 61,177, at 61,131 (1991), *aff'd sub nom*., *Michigan Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert denied*, 510 U.S. 990 (1993).

[7] Empire Motion at 4 (citing *Sea Robin Pipeline Company*, 92 FERC ¶ 61,217 (2000).

5. Empire argues that it will suffer irreparable harm if required to pay refunds prior to a judicial review of the April 25 Order. It contends that its anticipated refund liability – approximately half a million dollars - is not *de minimis* and it would not be in the best interest of Empire and its customers.

6. Empire further argues that the Commission has stated previously that it will issue a stay "when justice so requires."[8] Empire argues that justice requires a stay because Empire will pay refunds to non-captive and/or non-FERC jurisdictional customers, which means that it has no effective means to surcharge those customers to recoup those refunds if the Commission is ultimately reversed by the court of appeals. Conversely, Empire argues that granting a stay in this uncontested docket, in which there are no intervenors, will not substantially harm other parties.

7. Finally, Empire argues that a party showing a strong likelihood of success on the merits need only show the possibility of irreparable injury.[9] Empire argues that it is likely to succeed on appeal because the Commission acknowledged in the April 25 Order that it reached different results in other cases, but attempted to justify its action based on its holding in Order No. 697. Empire argues that that rationale is inapposite here because Order No. 697 adopted prospective rule changes that did not apply to the transactions at issue here. Empire argues that the Commission failed to reconcile its treatment of Empire with rulings in other cases where the Commission concedes it reached inconsistent results, making it likely that the court of appeals will find the Commission's decision here to be arbitrary and capricious.

8. Empire also argues that, to the extent that the Commission denies Empire's request for stay of the order to pay refunds, the Commission should authorize Empire to place the refunds into an interest-bearing escrow account pending judicial review.[10] Empire states that it will place into the escrow the refunds accumulated as of the date it establishes the escrow, including interest, and will continue to pay refunds into the escrow account while judicial review is pending. Empire argues that the escrow account is warranted because it contends that it has a strong likelihood of success on appeal should it pursue judicial review.

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[8] Empire Motion at 5 (citing, e.g., *The Montana Power Co*., 80 FERC 61,175, at 61,735 n.7 (1997).

[9] Empire Motion at 6 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, F.2d 921, 925 (D.C. Cir. 1958)).

[10] Empire Motion at 7 (citing *Panhandle Eastern Line Co*., 107 FERC ¶ 61,237, *reh'g*, 109 FERC ¶ 61,054 (2004); *Plains Petroleum Co*., 84 FERC ¶ 61,140 (1998)).

III. Commission Determination

9. We will deny Empire's request to retain, pending judicial review, the refunds that the Commission has found are owed to its customers. The law requires the ordering of refunds at the earliest possible moment,[11] and the Supreme Court has stated that "[i]t is the duty of the Commission …, where refunds are due, to direct their payment at the earliest possible moment consistent with due process."[12] The rationale for prompt ordering of refunds is clear: "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[13] Further, as Empire concedes, the Commission generally denies requests for stays of refunds, which *inter alia* assures definiteness and finality in Commission proceedings.[14] We see no reason to find differently here.

10. Under section 705 of the Administrative Power Act, the standard for granting a stay by an administrative agency is whether "justice so requires."[15] The Commission must balance the interests of the party seeking the stay with the overall public interest, and determine whether the requesting party will sustain irreparable harm in the absence of a stay.[16] As we explained in our earlier orders, Empire charged market-based rates that were not properly mitigated, i.e., Empire overcharged, and we find that it would not be in the public interest to allow Empire to retain these overcharges any longer than necessary but rather these overcharges should be refunded to the customers that were overcharged as quickly as possible. In addition, a showing of irreparable injury must be more than unfavorable economic circumstances or loss of profits,[17] and Empire has made no such showing here.[18]

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[11] *Interstate Natural Gas Assoc. v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985).

[12] *FPC v. Tennessee Gas Transmission Co*., 371 U.S. 145, 155 (1962).

[13] *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378,388 (1959).

[14] *See Sea Robin Pipeline Co*., 92 FERC ¶ 61,217, at 61,710 (2000).

[15] *See* 5 U.S.C. § 705 (1984).

[16] *Olympic Pipe Line Co*., 102 FERC ¶ 61,055, at P 17 (2003) (citations omitted).

[17] *Id*.

[18] The Commission has previously explained that, should a court overturn Commission orders, either the Commission or the court may provide a remedy to recover previously-refunded amounts. *Panhandle Eastern Pipe Line Co*., 103 FERC ¶ 61,099, at P 5 (2003).

11. Further, the Commission does not find merit in Empire's contention respecting the likely outcome of judicial review of the subject orders. The Commission has fully considered the merits of Empire's argument that the Commission has failed to reconcile its treatment of Empire with rulings in other cases. In denying rehearing, we considered all relevant factors, including developments in Commission case law and the Commission's findings in Order No. 697. We took into account the earlier cases that had erroneously accepted mitigation proposals similar to Empire's, i.e., those that limited mitigation to sales that sink in the balancing authority area, and explained why, upon further review, such proposals were insufficient to mitigate the seller's potential to exercise market power.[19] In addition, the Commission also stated that prohibiting only market-based rate sales that sink in the balancing authority area was inconsistent with Commission precedent.[20]

12. In addition, for similar reasons, we will deny the request to place the refunds into escrow. As stated above, we disagree with Empire's assertion that Empire is likely to succeed on appeal. Further, we find no apparent benefits to customers that would be realized through the placement of refunds into an escrow account; to the contrary, if we were to grant Empire's motion customers that were inappropriately overcharged in the first place would continue to be denied the just and reasonable rates that they were entitled to by virtue of the deferral of the relief that the Commission found was appropriate – refunds of the overcharges. Empire must, at a minimum, show the public benefits that would accrue from its proposal to justify our deviating from our usual policy of requiring refunds to be paid as quickly as possible following issuance of a final order. In addition, the *Panhandle* case relied on by Empire is distinguishable. That case involved an atypical situation, the hotly contested *ad valorem taxes*. Here, in the different context of overcharges, Empire has stated no sufficient rationale which would compel the use of an escrow account in place of the traditional direct refund of those overcharges (with interest at the Commission-prescribed rate).[21]

13. Accordingly, we will deny the request for stay or for the establishment of an escrow account.

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[19] April 25 Order, 123 FERC ¶ 61,084 at P 19.

[20] *AEP Power Marketing, Inc*., 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

[21] The rehearing of the *Panhandle* case also noted that "Commission-ordered refunds are to be paid promptly." *Panhandle Eastern Pipe Line Co*., 109 FERC ¶ 61,054, at P 25 (2004)

The Commission orders:

The request for stay or, in the alternative, for refunds to be placed into an interest-bearing escrow account, is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.